No. 15176

In the United States Court of Appeals For the Ninth Circuit

MAURICE PENN,
Appellant,

vs.

WILLIAM R. GRANT, Trustee in Bankruptcy of L. R. MAHAN, also known as LEMUEL ROSS MAHAN,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

Petition for Rehearing

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TABLE OF CASES AND AUTHORITIES CITED

Cases

Rule

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Petition for Rehearing

To the Honorable, Albert Lee Stephens, Stanley Barnes, Circuit Judges, and Charles E. Clark, District Judge:

The appellant above-named respectfully petitions this Honorable Court for a rehearing of the appeal in the above-entitled cause, and in support of this petition represent to the Court as follows:

We reserve our argued position as to each of the points of appeal, but in this petition address ourselves solely to that feature of the decision wherein we believe the Court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this Court that it has erred in its determination on 2 major questions put to it upon appeal.

I.

On page 2 of its printed Opinion, this Court concluded that the finding of insolvency on the date of issue by the Referee was fully justified since the Referee stated that serious questions existed as to whether the finance company is subject to the usury act, or is a personal loan company excluded therefrom, and also *whether the amount claimed is the correct amount,* (italics added). This Court also concluded that the weight to be given to this claim for usury (based on the testimony of Mrs. Mahan, wife of the bankrupt) was properly within the discretion of the Referee.

What this Court overlooked is that Mrs. Mahan was called as a witness by the trustee, and she was a witness for and on behalf of the trustee. Under those circumstances the trustee was bound by her testimony.

It is axiomatic that a party is bound by the testimony of his own witnesses (*Wright v. Gordon's Transport,* 162 Fed. 2d 590, 591). Put another way, it has been held that a litigant cannot challenge his own unimpeached witness (*Burdon v. Wood,* 142 Fed. 2d 303, 306; Certiorari denied, 323 U.S. 733, 65 Sup. Ct. 70; 89 L. Ed. 588). This rule applies even where the litigant is a *quasi* public official. For example, in *Bowles v. Marx Hide and Tallow Co.,* 153 Fed. 2d 146, 147, the

Court held that an OPA Administrator vouches for the credibility of his own witness.

In *Re Erickson,* 13 Fed. Supp. 853, 855, the Court held that where

> "An objecting creditor presented the bankrupt as his witness, as his sole witness, and as a credible witness, and is bound by his testimony, and he cannot be impeached or assailed by the objecting creditor."

In *Wiget v. Becker,* 84 Fed. 2d 706, in reversing a judgment for the defendant, the Court held on page 710 as follows:

> "Ordinarily, a party is bound by the testimony of his own witnesses. *Yellow Cab v. Rodgers,* (C. C.A. 3) 61 Fed. (2d) 729. To be sure, the evidence might justify the argument that a witness was mistaken, and the trier of fact may so find, but there must be evidence of mistake. *Michigan Central R. Co. v. Zimmerman,* (C.C.A. 6) 24 Fed. (2d) 23. There is no contention that Mr. Kurtzeborn made any mistake in his testimony, or that the facts upon which counsel have apparently acted in making the statement and admission of record are not true."

Likewise in the case at bar, no question has been raised why the testimony of Mrs. Mahan as to the value of her claim should be disregarded. Since this is testimony offered by the trustee in behalf of its own case, there is no justification whatsoever, why this testimony should be disregarded.

II.

If we assume, for the sake of argument, that the Referee was justified in giving no weight to the evidence of Mrs. Mahan, then it was still error to find the bankrupt insolvent on the date in issue (Op. p. 2) *for in such event there is no testimony of any type as to the value of the chose in action.* Bearing in mind that the trustee has the burden of proving the value of a chose in action for the purpose of sustaining his obligation that the bankrupt was insolvent, disregarding the testimony of Mrs. Mahan that the chose in action was valued at the sum of $81,719.61 *does not* establish that the value of the chose in action was that amount or any amount or entirely valueless, for mere disbelief of a witness does not establish an affirmative case (*Heise v. Earnshaw Publications,* 130 Fed. Supp. 38, 41).

In *Estate of Burlew,* 146 A.C.A. 695, the court said on pages 701, 702 as follows:

> "While her testimony could have been disbelieved, there was no other evidence to believe, and as is said in *Hutchinson v. Contractors' State etc. Board,* 143 Cal. App. 2d ....., ..., ... [300 P. 2d 216]: (Advance Report Citation: 143 A.C.A. 733, 737-738)
>
> 'But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. " 'Disbelief does not create affirmative evidence to the contrary of that which is discarded. " "The fact that a jury may disbelieve the testi-

mony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative. (citing cases)." " . . . The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (citing cases)."

See also *Hutchinson v. Contractors State etc. Board,* 143 Cal. App. 2d 628; 300 P. 2d 216.

In *Barnett v. Terminal Railroad Assn. of St. Louis,* 228 Fed. 2d 756, 761, the court held that:

"Where a party's own testimony, if true, would defeat his right to a verdict, and such statements are not modified or explained, a verdict may be directed against him."

In re Erickson, 13 Fed. Supp. 853, 855, the Court held:

"Even so, there is no testimony in the case except that of the bankrupt and it is upon his testimony that reliance must be placed for decision here. The objecting creditor conducted the examination upon the apparent assumption that he was entitled to cross-examine and, if possible, impeach his own witness. A considerable part of the examination was conducted along this line and was not objected to, although objections, if made, would

probably have been sustained by the referee. Examining the record in the light of the foregoing authorities, the report of the referee upon the facts and his recommendations cannot be sustained."

In *Controller of California v. Lockwood,* 193 Fed. 2d 169, this court in commenting upon the duties of a referee in bankruptcy to make findings upon evidence and not suspicion said as follows on page 172:

> "We agree with the District Court that there is no factual basis for the referee's conclusion. Suspicion, no matter how aroused, is not evidence. What we find here does not establish the fact in dispute. It lacks the quality of proof. The inference which the referee drew does not rest upon supporting fact or facts. His deduction does not come within the orbit of another certain truth. There are too many loopholes for a false deduction."

The point that appellant has raised and which appellant insists is error, is that even if the referee chose to disregard the testimony of the witness Mrs. Mahan as to the value of the chose in action, then there is no evidence in the record whatsoever as to any value which may be attributed to the chose in action. The referee did state

> "That serious questions existed as to whether the finance company is subject to the usury act or is a personal loan company excluded therefrom,

and also whether the amount claimed is the correct amount." (Italics added) (Op. p. 2)

But although the Referee may have decided to disregard the testimony of Mrs. Mahan and that the claim for usury in the sum of $81,719.61 was inchoate and uncertain in character and amount, it is also equally true that there is no evidence as to what the actual value of the chose in action is, and the Referee under the circumstances had no basis in fact or otherwise to come to the conclusion that it was entirely valueless.

For the foregoing reasons it is respectfully requested that this petition for a rehearing should be granted.

Respectfully submitted,

JOSEPH W. FAIRFIELD
ETHELYN F. BLACK
MAX H. GEWIRTZ
Attorneys for Appellant

STATE OF CALIFORNIA,
County of Los Angeles.—ss.

JOSEPH W. FAIRFIELD, being first duly sworn, on oath, certifies and says:

That he is one of the attorneys for appellant in this cause; that he makes this Certificate in compliance with Rule 23 of the Rules of this Court; that in his judgment the within and aforegoing Petition for Rehearing is well founded and is not interposed for delay.

JOSEPH W. FAIRFIELD

[Joseph W. Fairfield]

Subscribed and sworn to before me at Los Angeles, California, this 6 day of June, 1957.

ETHELYN F. BLACK

[Ethelyn F. Black]
Notary Public in and for the State of California, County of Los Angeles.